Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Request for Emergency Temporary Relief	)	CC Docket No. 96-262
Enjoining AT&T Corp. from Discontinuing	)	
Service Pending Final Decision	)	

REPLY COMMENTS
of the
MINNESOTA CLEC CONSORTIUM

June 29, 2000

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SUMMARY

The Comments of AT&T Corporation ("AT&T") attempt to mischaracterize its actions as a mere attempt to negotiate access rates and a decision to not accept access services or extend its service. To the contrary, AT&T has threatened to both: 1) refuse to deliver traffic terminating from its network to customers of Minnesota CLEC Consortium ("MCC") Members; and 2) refuse to accept traffic from customers of MCC Members. The threat to customers of being unable to receive calls from AT&T customers, who still represent over 50% of total interstate minutes of use, is an unlawful effort by AT&T to leverage its still very substantial market share. The severity of that threat by AT&T will compel MCC Members to accept any demand by AT&T, which will preclude the arm's length bargaining that is essential to a market based approach to access charge levels. AT&T's non-dominant status does nothing to relieve the coercive effects of such threats, and the Commission's decision to confer non-dominant status on AT&T was not intended to enable such actions by AT&T.

AT&T also remains bound by its Tariff, which does not support either AT&T's refusal to accept access services that are available from MCC Members for either originating or terminating traffic.

Contrary to AT&T arguments, AT&T is obligated to interconnect with the networks of other carriers, including MCC Members, under Sections 201 and 251, and that obligation includes the duty to exchange traffic. AT&T is also required to obtain certification under Section 214 prior to discontinuing either originating or terminating services to customers of MCC Members in areas served by AT&T.

MCC Members will be irrevocably injured if AT&T is allowed to impose it unlawful threats while the rulemaking remains pending since AT&T's threats would preclude MCC

Members from offering a viable local service offering. MCC Members have standing to bring this Request for Emergency Relief before the Commission to prevent such unlawful actions by AT&T.

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In the Matter of

Request for Emergency Temporary Relief Enjoining AT&T Corp. from Discontinuing Service Pending Final Decision	))))	CC Docket No. 96-262

To: The Commission

REPLY COMMENTS OF MINNESOTA CLEC CONSORTIUM

The Minnesota CLEC Consortium and its members Ace Telephone Association; HomeTown Solutions, LLC; Hutchinson Telecommunications, Inc.; Integra Telecom of Minnesota, Inc. ("Integra"); Local Access Network, LLC; Mainstreet Communications, LLC; NorthStar Access, LLC; Otter Tail Telcom, LLC ("Ottertail"); Paul Bunyan Rural Telephone Cooperative; Tekstar Communications Systems, Inc.; U.S. Link, Inc.; VAL-ED Joint Venture, LLP; and WETEC, LLC (collectively "MCC Members"), by their attorneys, submit these Reply Comments pursuant to the Public Notice dated May 15, 2000. These Reply Comments address primarily the Comments of AT&T Corp. dated June 14, 2000.

A. AT&T's COMMENTS IGNORE THE COERCIVE EFFECT OF ITS DEMANDS.

AT&T has attempted to characterize its actions as merely an effort to negotiate access rates and a decision to not accept access services or to extend its service. AT&T Comments pp. 2-8; 21-24. To the contrary, AT&T is attempting to leverage both its terminating and originating market shares and coerce MCC Members and other small CLECs. If AT&T is allowed to do so, there will be no possibility of arm's length bargaining that is a prerequisite for market based determination of access charges.

1. AT&T's Demands Attempt To Leverage Its Terminating And Originating Market Shares And Would Prevent Arm's Length Negotiations Of Access Charges With MCC Members.

AT&T's characterization of its demands ignores the extraordinary leverage that AT&T has attempted to apply to MCC Members, leverage that will prevent the arm's length negotiations that are a necessary prerequisite to a marketplace approach to small CLEC access charges. AT&T's position also provides a critical insight into the manner in which AT&T would conduct negotiations with small CLECs unless its misuse of leverage is restrained.

AT&T's leverage arises from its clearly stated intentions: 1) to refuse to accept originating traffic from MCC Members' end-user customers; and 2) to prevent delivery of terminating traffic from all of its customers to MCC Members' end-user customers, unless and until MCC Members acquiesce in AT&T's demands that MCC Members' access charges be reduced to levels that AT&T finds acceptable. AT&T's intentions are stated in a January 19, 2000 letter from AT&T to MCC Member Integra (attached to the Request for Emergency Relief of the MCC) and reads in part:

> We hereby instruct Integra to immediately cease routing all traffic originating in the State of Minnesota to AT&T's network, including, but not limited to, zero plus, one plus, five hundred plus, seven hundred plus, 8YY plus, 900 plus and all AT&T associated 10-10-XXX traffic. *In addition, Integra should not complete any calls terminating from AT&T's network that are intended for Integra's local exchange customers in Minnesota.*

(Emphasis added.) MCC Member Ottertail received an identical demand from AT&T by letter dated December 6, 1999 (attached to the Request for Emergency Relief of the MCC). Infotel Communications, Inc. (now part of MCC Member Integra) received an identical demand from

AT&T by letter dated June 13, 2000 (attached hereto).[1] It is clear that AT&T's efforts to leverage its position remain unchanged, even during the pendency of this Request for Emergency Relief.

If AT&T is allowed to refuse to accept originating traffic and to prevent delivery of traffic terminating from its network, it will achieve virtually dictatorial powers over small CLEC access charges and would undermine the emergence of local competition, the central goal of the Telecommunications Act of 1996 (the "Act").

2. AT&T's Threat To Prevent Delivery Of Traffic Terminating From Its Network Would Be Devastating To MCC Members' End-User Customers And To MCC Members' Ability To Compete.

AT&T's position is that it is unwilling to deliver terminating traffic from the vast number of customers that it serves to end-user customers of MCC Members. AT&T will be able to wield overwhelming leverage against small CLECs if AT&T is allowed to prevent the delivery of traffic terminating from the AT&T network to a CLEC's customers[2] because virtually no customers will be willing to accept competitive local service that precluded those customers from receiving long distance calls from any of AT&T's customers. Although AT&T is a non-dominant carrier, it retains a very substantial share of the total interstate market from which

[1] That letter reads in part:

> We hereby instruct InfoTel to immediately cease routing all traffic to AT&T's network, including, but not limited to, 0+, 1+, 500+, 700+, 8YY+, 900+ and all AT&T associated 10-10-XXX traffic. In addition, InfoTel should not complete any calls terminating from AT&T's network that are intended for InfoTel's local exchange customers.

[2] Comments of Sprint Corporation, June 14, 2000 ("Allowing carriers to decide whether and on what terms to interconnect can result in inconvenience to the public and can also allow carriers with monopoly or monopsony power to exert undue leverage *vis-à-vis* their smaller counterparts.") at p. 2; Comments of US West Communications, Inc. ("If AT&T could simply decide that it would provide long distance service only to local exchange carriers ("LEC") and/or cable companies with whom it chooses to deal, it could effectively eliminate much of the competition in all markets in which it participates.") at p. 5. Comments of Association of Communications Enterprises, p. 3; Comments of Montana Telecommunications Association, p. 3.

MCC Members' customers will need the ability to receive calls. The *Trends in Telephone Service, March 2000*, prepared by the Industry Analysis Division, Common Carrier Bureau ("*Trends in Telephone Service* "), indicates that, as of 1998, AT&T still carried approximately 50% of total interstate minutes.[3] If AT&T were allowed to block delivery of that traffic (either by compelling MCC Members to block terminating traffic, as it has demanded MCC Members do,[4] or by blocking that traffic itself), AT&T would have the ability to prevent customers of MCC Members from receiving interstate interexchange communications from the access lines that originated approximately 50% of total interstate minutes.

If AT&T were able to do this, existing and potential end-user customers of MCC Members would quickly learn that using MCC Members' local service would mean that they would be unable to receive messages representing approximately 50% of total interstate traffic (and from the customers generating that traffic). No customer would accept such a service, and the results would be devastating to both MCC Members and to the development of competition in areas served by MCC Members. As a result, MCC Members would be virtually precluded from the competitive local service market unless they fully comply with AT&T's demands.

Armed with such a threat, AT&T would be able to virtually dictate access charge levels to MCC Members (and other CLECs) and to require them to provide below cost access services, or even free access services, since the alternative (no terminating access from AT&T customers)

[3] See, *Trends in Telephone Service,* Chart 11.4.

[4] See, Letters from AT&T to Ottertail and Integra, attached to MCC Request for Emergency Relief, and to InfoTel, attached hereto.

would prevent MCC Members from providing a local service offering that would be acceptable to virtually any customer.[5]

Allowing AT&T to achieve such coercive power will preclude the effective operation of market forces to set access rates. The ability of customers to select other carriers to provide their originating long distance service provides no recourse from the coercion that AT&T could apply through its control of approximately 50% of total interstate terminating traffic. As a result, AT&T's status as a "non-dominant" carrier does not justify or prevent this abuse of power by AT&T.

AT&T's misuse of that power should not be allowed, even while this rulemaking is pending.

3. Inability To Offer AT&T Originating Service Would Impose An Additional Severe Marketing Obstacle To MCC Members.

Even if AT&T does not block its terminating traffic, if AT&T is able to prevent MCC Members from offering their customers the choice of AT&T's service, MCC Members would face a significant marketing obstacle with current AT&T customers in their areas. Those customers still represent a very large portion of total available customers.

Data from the *Trends in Telephone Service* indicates that AT&T still served approximately 62% of residential access lines as of 1998.[6] The *Trends in Telephone Service* also indicated that AT&T's residential market share had declined by about 12% in the preceding 4 years from 1995 to 1998. Even if AT&T's market share has been reduced to 50% in the

[5] AT&T will undoubtedly argue that it is merely insisting that access charges be as low as the Incumbents', but AT&T's incentives to demand more access charge concessions would be strong, and AT&T has demonstrated that it will seek every opportunity to increase the margins between access charges and its retail rates, prior commitments notwithstanding.

[6] See, *Trends in Telephone Service*, Table 11.5.

subsequent 2 years, AT&T's refusal to provide originating service will still represent a very significant marketing impediment for MCC Members to require 50% of their potential customers to change long distance providers.

B. AT&T'S NON-DOMINANT STATUS DOES NOT JUSTIFY ITS SELF-HELP WITHDRAWAL OF SERVICE OR ITS REFUSAL TO MAINTAIN OR ESTABLISH INTERCONNECTION WITH MCC MEMBERS.

It is clear that AT&T's status as a non-dominant carrier does not relieve it of its obligations under the Communications Act. Further, there is no indication that the Commission contemplated that AT&T would use threats to withhold its terminating traffic from customers when it found that AT&T lacked "market power" and was non-dominant.

AT&T cites the First Report and Order, *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 85 F.C.C.2d 1, (1980) ("*Competitive Carrier First Report and Order*"), suggesting that a non-dominant carrier's inability to control prices resolve all issues under sections 201 and 202. AT&T Comments at pp. 11-12. AT&T also notes that the Commission has repeatedly found that the interexchange market is vigorously competitive. AT&T Comments pp. 12-13. These generalities neither resolve issues arising from AT&T's actions in this proceeding nor indicate that AT&T has no obligations under the Communications Act.

To the contrary, in the Order, *Motion of AT&T Corp. To Be Reclassified As A Non-Dominant Carrier*, 11 FCC Rcd 3271 (1995) ("*AT&T Non-Dominance Order*"), the Commission said in part:

> Declaring AT&T non-dominant will not remove AT&T from regulation. Like other non-dominant carriers, AT&T will still be subject to regulation under Title II of the Act. *Specifically, non-dominant carriers are required to offer interstate services under rates, terms and conditions that are just, reasonable and not unduly discriminatory (Sections 201-202)*, and non-dominant carriers are subject to the Commission's complaint process (Sections 206-209). *Non-dominant*

> *carriers also are required to file tariffs pursuant to our streamlined tariffing procedures (Sections 203, 205) and to give notice prior to discontinuance, reduction or impairment of service.*

(Emphasis added.) At ¶13. Clearly, non-dominant status does not absolve AT&T of its obligations under the Communications Act.

AT&T also notes that the Commission does not regulate carrier decisions to extend service. AT&T Comments pp. 13-14. The decision to extend service is far different, however, from the decision to reduce or impair service. The Commission made it clear that Section 214 continues to apply to discontinuances or reductions of service by non-dominant carriers, including AT&T, saying:

> Further, requests to discontinue or reduce service [by AT&T] will be deemed granted after 31 days unless a party or the Commission objects.

AT&T Non-Dominance Order at ¶12. The potential adverse impact on customers of discontinuances, reductions or impairments has been recently noted. In the Report and Order and Second Memorandum Opinion and Order, *Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996; Petition for Forbearance of the Independent Telephone & Telecommunications Alliance*, 14 FCC Rcd 11364 (1999), the Commission said in part:

> AT&T further argues that the Commission should eliminate the customer-notice requirement entirely for non-dominant interexchange carriers, competitive access providers, and competitive local exchange carriers.
>
> *Because of the potential impact of the discontinuance, reduction or impairment of service by a carrier, we will continue to require certification* under our new streamlined procedures for a domestic carrier to discontinue, reduce or impair service over a line, regardless of whether the carrier's initial certification … was obtained under blanket authority or was not required because the line is exempt … .

(Emphasis added.) At ¶¶28-29.

AT&T also notes that the Commission has not regulated decisions by carriers in regards to whether to appear on equal access ballots. AT&T Comments p. 14 -15. The decision of whether to appear on an equal access ballot is also far different from a decision by a carrier to discontinue or reduce service.

AT&T states that the ability to refuse service is essential to operation of a market based approach to CLEC access charges. AT&T Comments pp. 16-17. The issue of whether to allow interexchange carriers to refuse to accept reasonably priced access services from CLECs is the core issue in the underlying rulemaking. Whatever conclusion the Commission reaches in the rulemaking, AT&T should not be allowed to engage in self help refusal to provide originating and terminating services while the decision in the rulemaking remains pending.

AT&T argues that its refusal to accept access services from MCC members is not an unreasonable denial of service under Section 201(a). AT&T Comments pp. 17-18. AT&T offers no authority for its argument that customers can be required to use the LEC selected by AT&T in order to obtain its service. Further, that position would violate the requirements of Section 251(a).

AT&T also argues that it is unreasonable for customers to expect to "obtain long distance services at the same price as customers of other ILECs and CLECs that charge AT&T only a small fraction of the price movants charge . . .". AT&T Comments p. 18. AT&T further states that it should be able to "treat movants customers differently than the customers of the ILECs or other CLECs that charge much lower prices," relying on *MCI Telecommunications Corp v. FCC*, 917 F.2d 30 (D.C. Cir. 1990) and *American Broadcasting Cos. v. FCC*, 663 F.2d 133 D.C.Cir. (1980). AT&T Comments p. 18. Neither case supports AT&T's refusal to provide service. *MCI* addressed the question of whether AT&T's charges for integrated packages constituted unlawful

discrimination under Section 202(a). *American Broadcasting* was based on the "functional equivalency test" and mentioned cost differentials only in passing. Further, AT&T's position must be rejected because it would render meaningless the prohibition on geographic deaveraging of interexchange rates in Section 254(g) and Rule 64.1801, 47 C.F.R. § 64.1801.

Further, there has been no demonstration by AT&T that the rates of MCC Members are unreasonable under the standards of Section 201(b), and the benchmark selected by AT&T (the rates of the incumbent LEC in the area) has been explicitly rejected by the Commission as a basis to conclude that rates are *per se* unreasonable.[7] Further, to the extent that AT&T would be allowed to refuse traffic from a CLEC because it had unilaterally determined that the rates were unacceptable, the same argument would allow AT&T to refuse traffic from a small incumbent LEC.[8]

The decision to declare AT&T non-dominant was based on its lack of ability to control prices.[9] The Commission noted that both residential customers and business customers are

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[7] In the Memorandum Opinion and Order, Sprint Communications Company, L.P. v. MGC Communications, Inc., FCC 00-206, the Commission said:

> We decline Sprint's invitation to hold that any access rate that is higher than the ILEC's is necessarily unjust and unreasonable under section 201(b). Nothing in the Commission's existing rules or orders supports Sprint's legal position.

[8] Comments of National Telephone Cooperative Association ("If AT&T is permitted to withdraw service from the CLECs without proper Commission Authority, it is likely that AT&T and other similarly situated carriers will view FCC tolerance as a license to terminate service to the customers of small and rural ILECs") at pp. 3-4.

[9] The *AT&T Non-Dominance Order* reads in part:

> We believe, in light of the evidence in this case and the state of competition in today's interstate, domestic, interexchange telecommunication market, we should assess whether AT&T has market power by considering whether AT&T has the ability to control price with respect to the overall relevant market.
>
> As our analysis below demonstrates, AT&T does not have the ability unilaterally to control prices in the overall interstate, domestic, interexchange market.

At ¶¶25-26.

"highly demand – elastic." *AT&T Non-Dominance Order* at ¶¶ 63, 65. There is no indication, however, that the Commission intended to grant AT&T the discretion to leverage its market power in terminating traffic by threatening to deny delivery of that traffic to customers of other carriers. Indeed, allowing AT&T to do so would quickly eliminate competition even in the interexchange market.

C. AT&T'S ACTIONS ARE INCONSISTENT WITH A REFUSAL TO ACCEPT ACCESS SERVICES.

AT&T argues that it has clearly rejected access services from MCC Members, citing instructions in its correspondence to MCC Members and the absence of ASRs. AT&T Comments, p. 4. To the contrary, AT&T's actions are inconsistent with both its correspondence and its demands and show that AT&T is deliberately using access services provided by MCC Members.

AT&T continues to market its services directly to MCC Members. These marketing activities are not limited to general media, but include direct solicitations. Examples of such direct solicitations include personally addressed letters, including checks payable by AT&T to business customers, that are willing to subscribe to AT&T interLATA and intraLATA service.[10] Direct contacts from AT&T to customers of MCC Members continued even after AT&T refused to provide service to those customers, including misstatements that the local carrier (MCC Member) had been unwilling to provide the customer's service connection.[11] Fortunately, AT&T also continues to terminate traffic to MCC Members' customers.

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[10] See, letters to Jim Smart and "Business Owner" attached to Request For Emergency Relief of MCC.

[11] See, letter to Wade Sjolie attached to Request For Emergency Relief of MCC.

All of these actions by AT&T are inconsistent with its demands to MCC Members and with its position that is has refused to accept access services from MCC Members.

D. AT&T'S TARIFF DOES NOT SUPPORT ITS REFUSAL OF AVAILABLE ACCESS SERVICES OR DENIAL OF SERVICE TO END-USER CUSTOMERS.

AT&T asserts that its Tariffs support its decision to refuse available access services from MCC Members. AT&T Comments, pp. 19-20. To the contrary, under established standards for interpretation of tariffs, AT&T's Tariffs fail to support its decision to refuse available access services from MCC Members. Further, AT&T's Tariffs fail to support its threat to prevent delivery of terminating traffic to customers of MCC Members.

Rule 61.2, 47 C.F.R. §61.2, establishes a basic obligation of all carriers' tariffs, reading in part:

> (a) In order to remove all doubts as to their proper application, all tariff publications must contain *clear and explicit explanatory statements* regarding the rates and regulations.

(Emphasis added.)

A carrier's obligations under Rule 61.2 were recently addressed in the Memorandum Opinion and Order, *Halprin, Temple, Goodman and Segrue v. MCI Telecommunications Corporation and Freedom Technologies, Inc. v. MCI Telecommunications Corporation*, 13 FCC Rcd 22568 (1998) ("*Halprin*"). In *Halprin*, the Commission found that MCI's tariff was not "clear and explicit" and accordingly violated Rule 61.2, saying in part:

> [I]t is an unreasonable practice for a carrier to file a tariff that contains terms that consumers will not understand. In the first instance, we find that consumers cannot understand the Tariff because *it contains insufficient explanatory information*. In the second instance, we find that consumers would not understand the Tariff, even if MCI were to provide further explanatory information, because the *Tariff's distinctions* between Subscriber and Non-Subscriber rates *are inherently confusing*.

At ¶8. AT&T's tariff similarly contains insufficient explanatory information and is too inherently confusing to support AT&T's refusal to accept available access services from MCC Members or its threat to refuse to deliver terminating traffic to MCC Members.

AT&T's tariff is insufficient because neither a customer (nor a CLEC) could reasonably understand that AT&T's services could be unavailable because AT&T might refuse to accept available and technically sufficient access services.

AT&T's Tariffs No. 1 and 27 contain the following identical provisions:

> Service is furnished *subject to the availability of service components required*. The Company will determine *which of those components shall be used and make modifications* to those components at its option. "Service components" shall include, but not be limited to, the existence of access and/or billing arrangements on an originating and/or terminating basis. *In the absence of access arrangements* between the Company and the access provider at a particular Station, a Customer may be unable to place calls from or to the affected Station.

(Emphasis added.) See AT&T Tariff F.C.C. No. 1, § 2.1.6.A.2 and No. 27, § 3.1.5.A.2. AT&T's WATS Tariff (Number 2) contains similar provisions.[12] A reasonable interpretation of these tariffs does not support AT&T's refusal, particularly given its obligation to provide "clear and explicit statements."[13]

The first sentence of the Tariff indicates that "availability of service components required" is the overriding consideration. "Availability" is defined as: "the quality or state of

[12] AT&T Tariff F.C.C. No. 2, § 2.1.7.a., reads:

> WATS is offered, subject to the availability of the facilities and service components required to provide service. "Service components" shall include, but not be limited to, the existence of access and/or billing arrangements on an originating and/or terminating basis. In the absence of access arrangements between the Company and the access provider at a particular Station, a Customer may be unable to receive calls at or from the affected location.

[13] 47 C.F.R. § 61.2.

being available."[14] "Available" is defined as: "present or ready for immediate use . . . ACCESSIBLE, OBTAINABLE."[15] The first sentence also indicates that if the "service components required" are accessible or can be obtained, those service components will be used to provide service.

The second sentence reinforces the interpretation that available access will be used. It states that AT&T will be responsible to decide "which of those components *shall be used* and make modifications." (Emphasis added.) This phrase indicates that there may be different ways that service components can be configured and that different service components may be used, but it does not suggest that available and technically suitable components would be refused. The third sentence merely identifies some of the "service components" that are needed.

The last sentence indicates only that if access arrangements have not been made, service may not be available. This sentence does not, however, indicate that AT&T may reject available access arrangements for reasons unrelated to technical suitability. Further, there is absolutely no indication that prices charged for the access components may affect AT&T's decision whether to use available access services. AT&T's tariff does not contain "clear and explicit statements" that AT&T may refuse available access components based on price. Further, to the extent that AT&T would argue that the last sentence of the tariff overrides the key concept of availability, the tariff is "inherently confusing."

Further, neither customers nor CLECs are charged with knowledge of AT&T's practices. Memorandum Opinion and Order, *Associated Press Request for Declaratory Ruling*, 72 FCC 2d 760, 764-65. ("Tariffs are to be interpreted according to the reasonable construction of their

[14] Webster's Ninth New Collegiate Dictionary.

[15] Id.

language; neither the intent of the framers nor the practice of the carrier controls, for the user cannot be charged with knowledge of such intent or with the carrier's cannon of construction." (Quoting *Commodity New Services, Inc.*, 29 FCC 1208, 1213, aff'd 29 FCC 1205 (1960).)

Further, ambiguities in tariffs must be construed against AT&T. *Halprin* ("In addition, we must construe any ambiguities in tariffs against the filing carrier.") Citing *Associated Press* and *Commodity New Services*, 29 FCC 1208, 1213, aff'd 29 FCC 1205 (1960).

AT&T's interpretation would also violate an implied covenant in AT&T's Tariff. A party to an agreement may not be excused from performance where the party voluntarily prevents the occurrence of a needed precondition. *R.A. Weaver & Assoc's, Inc. v. Haas and Haynie Corp.*, 663 F.2d 168, 176 (D.C. Cir. 1980) ("It is well settled that nonoccurrence of a condition precedent to a promissor's performance is normally excused when fairly attributable to the promissor's own conduct. *An express promise to perform on the happening of an event warrants implication of a promise to refrain from activity impeding its happening, and breach of the implied promise is legally as serious as breach of the express*.") (Emphasis added.) Here AT&T promised to provide service if access arrangements were "available," and then caused the non-occurrence of access arrangements by simply choosing to not accept access arrangements from MCC Members. That combination of factors violated an implied covenant in AT&T's Tariff and does not justify its non-performance of common carrier obligations to MCC Members' end-users.

For these reasons, AT&T's tariff does not support its refusal to accept available access services from MCC Members.

E. AT&T's ACTIONS REQUIRE CERTIFICATION UNDER SECTION 214.

AT&T offers several arguments to support its position that its actions do not require certification under Section 214. AT&T Comments pp. 21-24. None of those arguments sustains its position.

AT&T first argues that the customers of the MCC Members are not a "community." To the contrary, it is clear that the customers of an individual carrier are a "community" within the meaning of Section 214. *ITT World Communications, Inc. v. New York Tel Co.,* 381 F. Supp. 113, 121 (S.D.N.Y. 1974) ("[N]othing has been offered to show that 'community' does not include an economic 'community' of users, such as international record carriers or domestic satellite carriers. . . . The important concept of 'community' in Section 214 I take to be the public interest."); *Chastain et al. v. A.T.&T.,* 43 FCC 2d 1079 (1973), *recon. denied* 49 FCC 2d 749 (1974). AT&T then argues that the purposes of Section 214 is really confined to monopoly providers. AT&T Comments pp. 21-22. This argument is refuted by the Commission's decision to require non-dominant carriers to obtain certification under Section 214 in order to withdraw or reduce service.[16]

AT&T cites Memorandum Opinion and Order, *Regulatory Policies Concerning the Provision of Domestic Public Message Services by Entities Other Than Western Union Tel. Co.,* 75 F.C.C. 2d 345 (1980) and Memorandum Opinion and Order, *Southwestern Bell Tel. Co. et al: Applications for Authority Pursuant to Section 214 of the Communications Act of 1934 to Cease Providing Dark Fiber Service*, 8 FCC Rcd 2589 (1993), *remanded on other grnd's,* 19 F. 3d 1475 (D.C.Cir. 1994). AT&T Comments pp. 21-22. Neither case supports AT&T's argument.

[16] *Competitive Carrier First Report and Order*, 85 FCC 2d (1980) and *Order Regarding Implementation of Section* 402, 14 FCC Rcd 11364 (1999).

Western Union addresses the implications of office and agency changes in connection with "public message services." The Commission decided that a carrier that desired to merely change its office and agency hours to provide service more efficiently did not require a Section 214 certificate. Id. at ¶105. AT&T cites *Southwestern Bell* for the proposition that where a "service discontinuance" merely causes a carrier to make technical changes in the manner in which it provides service without impairing the ability to provide service, there is no Section 214 issue. AT&T Comments p. 22. The Commission, however, further stated:

> [T]he intent in Western Union was merely to exclude technical or financial considerations when their impact was limited solely to the carrier customer, and did not affect the carrier customer's ability to continue to provide service to its customers. . . . However, where the technical or financial impact on the carrier customer is such that it would lead to discontinuance or impairment of service to its customers, such considerations may establish that Section 214 authorization is required.

8 FCC Rcd. 2589 at ¶48. Here, the impact of AT&T's actions will preclude MCC Members from delivery of AT&T services to end-user customers, not merely change the manner in which such service is provided.

F. AT&T'S CONSTRUCTION OF THE TERM "INTERCONNECTION" WOULD RENDER SECTION 251(a) MEANINGLESS.

AT&T is obligated by both Sections 201 and 251(a) to accept reasonable requests for interconnection. AT&T's attempts to limit that obligation by reference to Section 253(c) should be rejected.

AT&T relies upon the Commission's *First Report and Order, Implementation of the Local Competition provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499 (August 8, 1996) ("*Local Competition Order*"), and *Competitive Telecommunications Ass'n v. F.C.C.*, 117 F.3d 1068 (8th Cir. 1997). AT&T's reliance is misplaced.

The *Local Competition Order* construed the term "interconnection" in Section 251(c) to not include the "transport and termination" of local traffic. The *Local Competition Order*, however, was based on the specific terms of Section 251(c) and other provisions addressing in detail the obligations of incumbent local exchange carriers.[17] These terms are unlike Section 251(a), which sets forth the obligations of all "telecommunications carriers," including AT&T.

Comptel affirmed the Commission's interpretation based on the specific terms of Section 251(c). 117 F.3d at 1071. However, the Court explicitly rejected an argument that the interpretation of "interconnection" in Section 251(c) must be based on the way the term "interconnection" is used elsewhere in the Act. 117 F.3d at 1072. AT&T is making a similar argument that should also be rejected.

AT&T also relies upon Rule 51.5, 47 C.F.R. § 51.5, to suggest that the duty to interconnect in Section 251(a) does not include any obligation to arrange for *use* of that interconnection. AT&T Comments pp. 25-26. However, the definition of interconnection in Rule 51.5 refutes AT&T's position, reading as follows:

> "Interconnection" is the linking of two networks *for the mutual exchange of traffic*. This term does not include the transport and termination of traffic.

(Emphasis added.) AT&T's argument ignores the purpose of interconnection as explicitly stated in Rule 51.5, which is "for the mutual exchange of traffic."

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[17] In the *Local Competition Order*, the Commission said in part:

> We conclude that the term "interconnection" under Section 251(c)(2) refers only to the physical linking of two networks for the mutual exchange of traffic. *Including the transport and termination of traffic within the meaning of Section 251(c)(2) would result in reading out of the statute the duty of all LECs to establish "reciprocal compensation arrangements for the transport and termination of telecommunications," under Section 251(b)(5).* . . . We note that because interconnection refers to the physical linking of two networks, and not the transport and termination of traffic, *access charges are not affected by our rules implementing Section 251(c)(2).* (Emphasis added.) At ¶176.

Further, AT&T's argument would render the interconnection obligations of Section 251(a)(1) and Rule 51.100 meaningless. Section 251(a) reads in part:

> Each telecommunications carrier has the duty – (1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers . . .

An interconnection that does not lead to the exchange of traffic would serve no useful purpose and would be, in effect, meaningless. Statutes shall be construed to give meaning to all provisions. *Benavides v. DEA*, 968 F.2d 1243, 1248 (D.C. Cir. 1992) (rejecting Attorney General's interpretation of a statutory provision that would make the provision "either superfluous or meaningless"); *RCA Global Communications, Inc. v. FCC*, 758 F.2d 722, 733 (D.C. Cir. 1985) (rejecting interpretation that "would deprive [the provision] of all substantive effect, a result self evidently contrary to Congress' intent"); *Ramah Navaho Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1344-45, n.6. (D.C. Cir. 1996) ("We will not . . . assume that Congress intended for that jurisdiction[al] [provision] to be meaningless.") Section 251(a)(2) also requires carriers to refrain from installation of features, functions or capabilities that do not conform to guidelines under Section 256.[18] This obligation confirms that non-discriminatory exchange of traffic between networks is the intent of Section 251(a).

[18] Section 251(a)(2) reads:

> Each telecommunications carrier has the duty --- . . . not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

Section 256(a) reads in part:

> It is the purpose of this section – (1) to promote nondiscriminatory accessibility by the broadest number of users and vendors of communications products and services to public telecommunications networks . . .

AT&T also argues that Section 251(a) imposes no obligations on it, but rather merely obligates carriers from which it might seek interconnection to comply with its requests. AT&T Comments, p. 26. There is no basis in the language of Section 251(a) to limit the obligation to carriers from which AT&T might seek interconnection. Further, that limitation is expressly inconsistent with the Commission's conclusions in the *Local Competition Order*.[19]

While telecommunications carriers (which clearly include AT&T) "should be permitted to provide interconnection pursuant to Section 251(a) either directly or indirectly, based upon their most efficient technical and economic choices" (id. at ¶997), there is no indication that *refusing* to interconnect is an option.

AT&T's effort to limit application of Section 251 in this manner is without support and contradicted by its plain language which imposes the obligation on all telecommunications carriers without distinction. AT&T's argument that Section 251(a) must be read in "pari materia" with Section 251(c) ignores the terms of Section 251(c) which impose many explicitly *unilateral* obligations on Incumbent LECs. There is no basis to construe the neutral language of Section 251(a) in a similar manner.

[19] The Commission said in part:

> We decline to adopt, at this time, Metricom's suggestion to forbear under Section 10 of the 1996 Act from imposing any interconnection requirements upon non-dominant carriers. *We believe that, even for telecommunications carriers with no market power, the duty to interconnect directly or indirectly is central to the 1996 Act and achieves important policy objectives*. Nothing in the record convinces us that we should forbear from imposing the provisions of Section 251(a) on non-dominant carriers. In fact, Section 251 distinguishes between dominant and non-dominant carriers, and imposes a number of additional obligations exclusively on incumbent LECs.

(Emphasis added.) *Local Competition Order* at ¶997.

G. MCC MEMBERS WILL SUSTAIN IRREPARABLE INJURY IF AT&T IS ALLOWED TO PROCEED WITH ITS THREATS.

AT&T asserts that MCC will not be irreparable damaged by AT&T's demands. AT&T Comments p. 29. To the contrary, MCC Members would be prevented from marketing services to any customers *during the critical startup phase of their operations* if AT&T is able to fulfill its threats, including AT&T's clearly stated intention to prevent delivery of traffic terminating from the AT&T Network.[20] Most MCC Members are in the early phase of their business operations, and fulfillment of AT&T's threats would impose devastating harm at a time when they are least able to withstand such harm. While AT&T has not yet fulfilled the threat to end termination of its traffic, that fact does not insulate AT&T from responsibility for its stated intentions.[21]

AT&T asserts that damage to goodwill is irreparable. AT&T Comments, p. 29. MCC agrees completely with AT&T that damage to good will is irreparable. However, AT&T has ignored the far more severe damage to MCC Members' good will that is being caused by its actions. MCC has demonstrated clearly the harm to its competitive position that results from AT&T's refusal to provide originating service. That harm is greatly compounded by AT&T's marketing practices, which include direct solicitation of MCC customers, who will thereafter be refused service from AT&T, undoubtedly causing such customers to assume some defect in the service provided by MCC Members.

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[20] See, AT&T letters to Integra and Otter Tail (attached to MCC Request for Emergency Relief) and AT&T Letter to Infotel (attached hereto).

[21] AT&T argues that it is "hornbook law" that MCC Members must submit affidavits in support of their claims. AT&T Comments, p. 27. AT&T's authorities all relate to the Federal Rules of Civil Procedure. Further, AT&T's correspondence does not require authentication and the Commission is fully able to draw conclusions regarding the impact of AT&T's threats on both customers and small CLECs.

AT&T's harm to MCC Members' good will is further compounded by AT&T's subsequent actions informing customers that "your decision to switch to AT&T was not processed by your local phone company."[22] Irreparable damage to good will is occurring at the crucial start-up phase for many MCC Members.

Further, the damage to MCC Members' good will that is already occurring would pale in comparison to the damage that would occur if AT&T succeeded in its stated intention to prevent delivery of terminating traffic. As previously discussed, no end-user customers will accept local service from a CLEC if those customers will be unable to receive calls representing approximately 50% of total interstate calling.

AT&T asserts that any harm to MCC Members is self induced and could be relieved by acquiescence in AT&T's demands. AT&T Comments, p. 30. In effect, AT&T argues that MCC Members could mitigate injury by acquiescence in AT&T's demands. The obligation to mitigate does not, however, extend that far. *S.J. Groves & Sons Co. v. Warner Co.*, 576 F.2d 524, 530 (3rd Cir. 1978) ("Where both the plaintiff and the defendant have had equal opportunity to reduce the damages by the same act and it is equally reasonable to expect the defendant to minimize damages, the defendant is in no position to contend that the plaintiff failed to mitigate. . . . The duty to mitigate damages is not applicable where the party whose duty it is primarily to perform a contract has equal opportunity for performance and equal knowledge of the consequences of nonperformance." (Citation omitted.)); *Shea-S&M Ball v. Massman-Kiewit-Early*, 606 F.2d 1245, 1250 (D.C. Cir. 1979) (Where defendant had primary responsibility, equal opportunity to prevent damage, and knowledge of consequences, "doctrine of mitigation of damages is not applicable"); *Hidalgo Properties, Inc. v. Wachovia Mortgage Co.*, 617 F.2d 196, 200 ("[T]he

[22] See, letter from AT&T to Wade Sjorle attached to Request For Emergency Relief of MCC.

effort which an aggrieved party must make to lessen its damages need only be reasonable under the circumstances of the particular case." (Citations omitted.)). It is unreasonable to expect MCC Members to acquiesce in AT&T's unlawful demands. Accordingly, AT&T's argument should be rejected.

H. AT&T WILL NOT BE IRREPARABLE HARMED IF MCC's REQUEST IS GRANTED.

AT&T asserts that it will be irreparably damaged if it is compelled to accept and pay for access services from MCC Members during the pendency of this rulemaking. AT&T Comments, pp. 29-30. To the contrary, there is no indication that requiring AT&T to accept access service from MCC members will have more than a minute financial impact on AT&T.

The MCC Members consist of 13 small CLECs providing service in Minnesota. The per minute interstate access charges established by MCC Members are generally comparable to the charges of their small incumbent LEC affiliates. *Trends in Telephone Service* indicates that AT&T had total revenues of over $40 Billion in 1998. It is inconceivable that access charges from 13 small CLECs would have a perceptible financial impact on AT&T.

AT&T also asserts that potential damage to its goodwill from granting MCC's Request is irreparable. AT&T Comments p. 29. AT&T's argument makes little sense as applied to AT&T, but is persuasive as applied to MCC Members. The confusion to customers that would result from a subsequent withdrawal of AT&T service would hardly be irreparable to AT&T, particularly since AT&T would have presumably decided not to serve those customers. It is difficult to imagine irreparable injury resulting from confusion by customers that AT&T had decided not to serve.

I. MCC AND ITS MEMBERS HAVE STANDING TO SEEK THE REQUESTED RELIEF.

AT&T suggests that, with the exception of the claim under Section 251, the Petitioners lack standing. AT&T Comments p 10. However, the cases cited by AT&T arose in the context of federal court litigation and were based on the Constitutional limitations on the jurisdiction of federal courts. United States Constitution, Article III. Such requirements are not applicable to proceedings before the Commission. Rather, the broader scope of standing in matters before the Commission,[23] and clear interdependence between the interests of MCC Members and their customers, provide standing to maintain this Request for Relief.[24]

AT&T relies on *Warth v. Seldin*, 95 S. Ct. 2197(1975) which involved constitutional and civil rights claims by various organizations and residents relating to a zoning ordinance. The Court denied standing because none of the plaintiffs had a present interest in any of the property in dispute and none had ever been denied a variance or permit. *Warth* at 2208. AT&T also omitted the qualifying term "generally" from its quotation from *Warth*. AT&T Comments p 10. In fact, the Court stated that:

> [T]he plaintiff *generally* must assert its own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.

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[23] Section 208(a) reads in part:

> Any person . . . complaining of anything done or omitted to be done by any common carrier subject to this chapter, in contravention of the provisions thereof, may apply to said Commissioner by petition which shall briefly state the facts . . .

See, also *Chastain et al. v. A.T.&T.*, 43 FCC 2d 1079(1973), recon. denied 49 FCC 2d 749 (1974). (Provider of service asserted claims based on rights of customers.) *MCI Telecommunications Corp. v. F.C.C.*, 917 F.2d. 30, 36 (D.C. Cir. 1990) (MCI's standing to challenge AT&T tariffs upheld against argument that MCI could not assert claims based on interest of consumers).

[24] MCC is also a party to the underlying rulemaking and obtains standing from the injuries sustained by its members as the result of AT&T's actions. See, *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.* 116 S. Ct. 1529 (1996) and *Hunt v. Washington State Apple Advertising Comm'n*, 97 St. Ct. 2434, 2441 (1977).

(Emphasis added.) *Warth* at 2205. The Court recognized that this general rule has exceptions, even in judicial proceedings subject to Article III requirements.[25]

AT&T's violations of the Communications Act have a direct impact on the relationships between MCC members and their customers.[26] MCC members as well as their customers are directly affected by AT&T's actions, thus giving the MCC Members standing to maintain this Request, even under the more stringent standards that would be applicable under Article III.

AT&T also relies on *Hong Kong Supermarket v. Kizer*, 830 F. 2d 1078 (9th Cir. 1987), and *Indemnified Capital Inv. V. R. J. O'Brien & Assocs., Inc*., 12 F.3d 1406 (7th Cir. 1993). Neither supports AT&T's argument.

In *Hong Kong Supermarket*, the Ninth Circuit affirmed the dismissal of the plaintiff's complaint, alleging discriminatory administration of the Special Food Program for Women, Infants and Children, because the plaintiff lacked standing required to maintain a civil action. The court further held that no "mutual interdependence of interests" had been established between the plaintiff and its customers. 830 F.2d. at 1083. In contrast, this proceeding is not subject to the requirements of Article III, and there is a clearly established interdependent relationship between MCC and its customers.

Indemnified Capitol Investment, S. A. arose as a federal district court civil action seeking monetary damages resulting from alleged fraud, breach of fiduciary duty and violations of the Commodity Exchange Act committed against the customers of the plaintiff. The Seventh Circuit

[25] "In some circumstances, countervailing considerations may outweigh the concerns underlying the usual reluctance to exert judicial power when the plaintiff's claim to relief rests on the legal rights of third parties." *Warth* at 2206.

[26] For example, AT&T asserts: "Section 202(a) therefore plainly permits AT&T to treat movants' customers differently than customers of the ILECs or other CLECs that charge much lower prices." AT&T Comments p. 19.

affirmed the decision that the plaintiff lacked standing because the plaintiff not only benefited from its customers' misfortune, but also did not suffer an injury in fact. 12 F.3d at 1411. Further, the Court noted that there was no requirement that the plaintiff pass any recovery on to its customers. (Id.)

AT&T also relies on A*merican Civil Liberties Union v. FCC,* 823 F.2d 1554 (D.C.Cir. 1987). AT&T Comments p. 10. AT&T asserts that *ACLU* involved a ruling as to the standing of cable customers to assert Communications Act claims on behalf of broadcasters. Id. To the contrary, *ACLU* actually involved a determination that an interpretative rule relating to leased access under section 612 of the Cable Communications Policy Act was not ripe for judicial review. 823 F.2d at 1579. Here the ongoing actions of AT&T present an immediate issue requiring determination, thus satisfying the standards of ripeness.

None of the cases that AT&T cites supports its argument under standards applicable to proceedings before the Commission. MCC Members have standing to assert all claims raised by their Request.

J. CONCLUSION.

For the reasons set forth above and in its Request for Emergency Temporary Relief, the Minnesota CLEC Consortium respectfully requests that the Commission order AT&T to make its services available to customers of Petitioners while this proceeding remains pending. In addition, the Commission should also find AT&T apparently liable for forfeitures as a result of its willful and repeated violation of various sections of the Act.

Respectfully submitted,

MINNESOTA CLEC CONSORTIUM

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Attorneys on Behalf of the Minnesota CLEC Consortium

CERTIFICATE OF SERVICE

I, Kim R. Manney, do hereby certify that, on this 29th day of June, 2000, I have caused the foregoing Reply Comments of the Minnesota CLEC Consortium in CC Docket No. 96-262, DA 00-1067 to be filed electronically with the FCC by using its Electronic Comment Filing System, and copies of the Reply Comments were served by first-class U.S. mail, postage prepaid, on the following parties:

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June 13, 2000

Greg Arvig
InfoTel Communications, LLC
651 Edgewood Dr.N
P.O.Box 2838
Baxter, MN 56425

Re: Invoices for Switched Access Services

Dear Mr. Arvig:

AT&T Corp. ("AT&T") is in receipt of invoices from InfoTel Communications, LLC ("InfoTel"), purportedly for switched access services.

AT&T has not ordered originating or terminating switched access services from InfoTel . Therefore, AT&T is not obligated to pay InfoTel for the access services on the invoices.

We hereby instruct InfoTel to immediately cease routing all traffic to AT&T's network, including, but not limited to, 0+, 1+, 500+, 700+, 8YY+, 900+ and all AT&T associated 10-10-XXX traffic. In addition, InfoTel should not complete any calls terminating from AT&T's network that are intended for InfoTel's local exchange customers. Moreover, we instruct InfoTel not to presubscribe any of its local exchange customers to AT&T's interexchange services. To the extent that InfoTel has improperly presubscribed its customers to AT&T, please notify all such customers immediately that InfoTel is not authorized to presubscribe customers to AT&T and assist them in selecting another interexchange carrier who has provided InfoTel with the appropriate authorization or another local exchange provider who is authorized to presubscribe its customers to AT&T's interexchange services.

We trust that InfoTel will immediately comply with AT&T's instruction not to presubscribe any of its customers to AT&T's long distance service. In the event that InfoTel does not for any reason comply with this instruction, please be advised that, although AT&T is not obligated to pay for access services it did not order, AT&T is legally obligated to bill the appropriate party for use of AT&T's long distance services. Moreover, AT&T must bill the appropriate party to prevent fraudulent use of its network. In order to do so, AT&T needs customer account records from InfoTel through the CARE or BNA processes for any use of AT&T's long distance services by InfoTel's local exchange customers provided through switched access services not ordered by AT&T. While AT&T has no choice but to accept these CARE records from InfoTel or request BNA information, such action in no way may be construed as the order or purchase of access service from InfoTel .

AT&T will hold InfoTel liable for all losses, damages and costs arising out of InfoTel 's improper and unauthorized routing of traffic to AT&T's network.

If InfoTel would like to discuss the possibility of mutually acceptable arrangements between the parties for InfoTel's provision of access services to AT&T, it will be necessary for InfoTel to execute the enclosed Confidentiality and Pre-Negotiation Agreement. AT&T's participation and willingness to engage in discussions with InfoTel are not to be considered an order, acceptance or purchase of originating and/or terminating switched access services from InfoTel by AT&T or a suspension, interruption, termination or revocation of AT&T's instruction to InfoTel to cease routing traffic to AT&T's network, to not complete calls from AT&T's network, and to stop presubscribing InfoTel's local exchange customers to AT&T's interexchange services.

Very truly yours,

William J. Taggart III

cc: Garry I. Miller
Brian Moore